

Determination

New Zealand Tegel Growers Association Incorporated [2022] NZCC 7

The Commission:	Sue Begg Dr Derek Johnston Vhari McWha
Summary of application:	The New Zealand Tegel Growers Association Incorporated has applied for provisional authorisation to collectively negotiate with Tegel Foods Limited.
Determination:	The Commerce Commission has decided to grant a provisional authorisation until the date determined by the operation of section 65AD(5) of the Commerce Act 1986, as it considers it is appropriate to do so.
Date of determination:	01 April 2022

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Introduction

1. On 16 September 2021, the Commerce Commission (the Commission) received an application from New Zealand Tegel Growers Association (TGA) seeking authorisation on behalf of its members to collectively negotiate the terms and conditions of its members' supply of chicken growing services to Tegel Foods Limited (Tegel) for a ten-year period (the Full Authorisation).¹ The statutory timeframe in which the Commission has to complete this investigation has been extended until 30 May 2022.
2. On 19 November 2021 the Commission issued a provisional authorisation under s 65AD(2) on the same terms as sought for the Full Authorisation (First Provisional Authorisation) until 25 March 2022.²
3. On 15 March 2022 TGA sought a further provisional authorisation on the same terms through to the conclusion of the Commission's investigation in respect of the Full Authorisation (Second Provisional Authorisation).
4. The Commission's investigation in relation to the Full Authorisation is well advanced and we have also been provided with information from Tegel and TGA about the negotiations they have been engaged in under the aegis of the First Provisional Authorisation.

Determination

5. The Commission's view is that it is appropriate to provisionally authorise the Proposed Arrangement (see Attachment A) until the date determined by the operation of section 65AD(5) of the Act. That is, until the Full Authorisation is determined, revoked or withdrawn.
6. In summary, the Commission considers provisional authorisation is appropriate because:
 - 6.1 on balance we consider the potential benefits are more likely than not to outweigh the potential detriments from provisional authorisation;
 - 6.2 evidence provided by the parties suggests potential benefits are likely to be brought forward while the Commission considers the Full Authorisation;
 - 6.3 provisional authorisation is unlikely to materially alter the market in a permanent way; and
 - 6.4 the balance of potential harm to any party as a result of granting or not granting provisional authorisation favours provisional authorisation. In particular we have taken into account that not granting provisional

¹ As New Zealand is in an 'epidemic period', TGA applied under section 65AA(2) and (3), and in the alternative section 58(1) and (2) of the Commerce Act 1986 (the Act).

² https://comcom.govt.nz/_data/assets/pdf_file/0020/272441/Final-Provisional-Determination-19-November-2021.pdf

authorisation would waste the costs and efforts TGA and Tegel have expended in their negotiations to date, and deny TGA and Tegel the potential benefits of any successful negotiation in the near future.

7. The Commission’s decision to grant provisional authorisation should not be taken as an indication of what the Commission might decide in respect of the Full Authorisation.³

Background

8. TGA is an industry association. TGA currently represents approximately 75 growers who supply Tegel with chicken growing services.⁴ TGA’s previous negotiations with Tegel resulted in individual contracts between Tegel and each grower. The contracts currently in place are known as the ‘Farm Management Agreements’ (FMAs).

9. A feature of the negotiations in this case concerns [] TGA and Tegel (the parties).
[

].

10. During the provisional authorisation period to date the parties have negotiated on a collective basis.

[]]. Whether an agreement will be executed by the parties is uncertain at the time of this decision.

How we assess provisional authorisations

11. The Commission may grant provisional authorisation for an application made under section 65AA or section 58 during the epidemic period if it considers it is appropriate to do so:

11.1 for the purpose of enabling due consideration to be given to the application;
or

11.2 for any other reason.⁵

³ See Commerce Commission, [Guidelines on Approach to Authorisations under the COVID-19 Response \(Further Management Measures\) Legislation Act \(May 2020\)](#) (COVID-19 Guidelines) at [47].

⁴ TGA is made up of: the Auckland Meat Chicken Growers Association, the Taranaki Broiler Growers Associations and the Canterbury Poultry Meat Producers Association (Regional Associations).

⁵ Sections 65AD(1) and (2) of the Act.

12. The Full Authorisation is an authorisation made under s 65AA and/or s 58 made during the epidemic period.
13. The Commission does not need to be satisfied that the Proposed Arrangement would meet the ‘public benefit test’.⁶ Instead, the Commission must consider that a grant of provisional authorisation would be appropriate.
14. Accordingly, the Commission has a greater discretion when considering whether to grant a provisional authorisation compared with full authorisation, and its COVID-19 Guidelines provide guidance on the factors the Commission will consider when deciding whether it is ‘appropriate’ to grant provisional authorisation.⁷

Evidence

15. During its investigation of the Full Authorisation the Commission has received evidence from, and interviewed, a large number of relevant parties including, but not limited to:
 - 15.1 Tegel and other chicken processors;
 - 15.2 growers and various grower associations; and
 - 15.3 wholesale and retail chicken purchasers (e.g., supermarkets, food service providers, and quick service restaurants).
16. Given the Commission’s extensive investigation to date; and the impending expiry of the First Provisional Authorisation, the Commission has opted to engage in a short, targeted consultation with Tegel in respect of the Second Provisional Authorisation.⁸
17. Tegel opposes the second provisional authorisation because:
 - 17.1 Tegel considers the costs and delays, and the failure to reach an agreement to date despite the First Provisional Authorisation, demonstrate that bilateral negotiations would lead to greater cost savings than collective negotiation; and
 - 17.2 TGA and Tegel should adopt what Tegel describes as ‘a normal approach’ which is for the parties to negotiate an agreement prior to seeking authorisation and make that agreement conditional on authorisation.

Relevant Markets

18. The Commission adopts the markets defined in its First Provisional Authorisation, these being the regional markets for both free-range and barn-raised chicken growing services in each of the greater Auckland, Canterbury, and Taranaki regions.⁹

⁶ Section 65AD(3) of the Act.

⁷ COVID-19 Guidelines at [50] and [51].

⁸ COVID-19 Guidelines at [59].

⁹ 2021 NZCC [26] at [26] – [27].

As a definition of the relevant downstream markets is not required for our analysis, we have not sought to define these.

With and without the Proposed Arrangement

19. Because the negotiations of the parties to date have proceeded in line with our view as expressed in the First Provisional Authorisation we largely adopt those views, with some modification to incorporate the evidence we have subsequently obtained. In our view in the scenario with the Proposed Arrangement:¹⁰

19.1 The parties will continue to engage in collective bargaining
[].

19.2 The parties are likely to
[].

20. In reaching this view we have placed weight on evidence gathered subsequent to the First Provisional Authorisation, including:

20.1 That the parties have engaged in collective bargaining as a result of the First Provisional Authorisation.

20.2 Tegel's submission that the parties have not yet reached an agreement carries some force. However, while the parties have not yet concluded an agreement,
[].¹¹

20.3 [].

20.4 That the parties
[] lends force to our view expressed in the First Provisional Authorisation that the parties are in a "symbiotic relationship".¹²

21. In the scenario without the proposed arrangement:

21.1 growers who seek to negotiate will only be able to negotiate on an individual basis;

¹⁰ 2021 NZCC [26] at [37] to [39].

¹¹

[].

¹² 2021 NZCC [26] at [38.3].

21.2 we consider that some of the growers are likely to individually negotiate [] with Tegel;

21.3 [].

21.4 [].

22. In reaching this view we have placed weight on evidence gathered subsequent to the First Provisional Authorisation including but not limited to [].

Our assessment of ‘appropriateness’

23. The Commission has applied the factors set out in its COVID-19 Guidelines, having particular regard to our current assessment of ‘the public benefit test’, on the evidence before us.¹³

Public Benefit Test

24. In our First Provisional Authorisation we concluded in weighing the potential benefits and detriments that:¹⁴

57. Based on the information currently available to the Commission, we consider the potential benefits are more likely than not to outweigh the potential detriments from provisional authorisation because it would enable TGA to avoid the duplication of some negotiating expenses across growers. This saving would materialise under a provisional authorisation irrespective of whether [].

58. We also consider that there is a real chance that provisional authorisation would generate much larger benefits as, although collective bargaining does not guarantee [], it would increase the likelihood of []. However, if collective bargaining were not enabled until after full authorisation was granted, [].

59. In contrast, we consider that provisional authorisation is less likely to generate relatively large detriments. Furthermore, many of the potential benefits and detriments of provisional authorisation are causally linked. Efficiency detriments would most likely arise if a collectively bargained agreement resulted in materially higher returns to growers. However, this outcome would require Tegel’s agreement, [] which would simultaneously produce the largest potential benefits.

60. Given this causal link, based on the information currently available, we consider that the potential benefits of granting provisional authorisation are more likely than not to outweigh the potential detriments. The potential benefits could be greater if []; however, even if [], transaction cost savings alone are likely to provide a sufficient benefit. We also

¹³ COVID-19 Guidelines at [49] – [50].

¹⁴ 2021 NZCC [26].

consider that collective negotiations are more likely to enable Tegel to negotiate a solution to its [] sooner than would occur otherwise.

25. In its investigation to date the Commission has not obtained any evidence that would cause us to depart from the overall conclusion reached above. However, we make three further observations relevant to this decision below:

25.1 The evidence arising from the actions of the parties to date¹⁵ suggest a higher probability of, and therefore greater weight may be placed on, the key benefits of this provisional authorisation being avoided transaction costs []. However there remains a degree of uncertainty given [].

25.2 If the Commission did not grant the Second Provisional Authorisation it would crystallise substantial transaction costs as [], wasting the costs and efforts of the parties to date.

25.3 The reference in []¹⁶ is evidence that provisional authorisation may give rise to more sophisticated and more efficient contracts, which would be a further benefit of provisional authorisation.

26. Accordingly in the Commission's view a scenario where the benefits of authorisation outweigh the detriments of authorisation is more likely than one where they do not.

Permanent Market changes

27. We adopt the conclusion of the First Provisional Authorisation that authorisation is unlikely to result in permanent structural market changes and note that conclusion is supported by the evidence to date.¹⁷

Purpose of the Act

28. We adopt the conclusion of the First Provisional Authorisation that authorisation would be consistent with the purposes of the Commerce Act but limited weight was placed on that factor.

Possible harm to TGA and other Parties

29. In the First Provisional Authorisation we reached the view (in summary):¹⁸

29.1 potential harm to TGA and Tegel could arise if provisional authorisation was not granted as they would not be able to realise the transaction cost savings

¹⁵ See above at [20.1] and [20.2].

¹⁶ See above at [20.3]

¹⁷ 2021 NZCC [26] at [61] – [63].

¹⁸ 2021 NZCC [26] at [72] – [77].

arising from collective negotiation of [];

29.2 potential harm to Tegel could arise if provisional authorisation was granted from:

29.2.1 the parties reaching an agreement that would be less favourable to Tegel than it would be able to achieve in bilateral negotiations;

29.2.2 growers discussing their respective bargaining positions with each other even if no agreement is entered into; and

29.3 Potential harm to consumers could arise if increased growing costs were passed on to consumers.

30. We adopt that framework, however given the evidence that has arisen from the negotiations between the parties to date we consider:

30.1 The potential harm arising from not granting provisional authorisation is more immediate and acute now because []. If provisional authorisation is not granted the efforts and costs of the parties to date will be wasted given []. Further, it would deny TGA and Tegel the potential benefits of any successful negotiation in the near future.

30.2 We acknowledge the submission by Tegel that the costs incurred attempting to reach an agreement to date may be evidence of harm to Tegel as a result of the First Provisional Authorisation. However, we remain of the view this harm was likely to be less than that caused by not granting a provisional authorisation. Further, [] even if harm has occurred, declining provisional authorisation now would only waste the cost incurred by Tegel to date, causing further harm to both parties.¹⁹

30.3 The fact that [] may suggest it is somewhat less likely that material harm will arise from any additional market power growers gain from collective bargaining, including any harm to consumers, as it demonstrates the growers are [] the market conditions Tegel faces. However, the weight we have placed on this point has been tempered by uncertainty arising from [] would have occurred in a scenario without a Provisional Authorisation.

¹⁹ Above at [19.2].

31. In some cases avoiding potential harm will favour not granting provisional authorisation. In this case we consider less harm is likely to arise from granting the Second Provisional Authorisation than from not granting it.

Urgency of Application

32. In the First Provisional Authorisation we noted that:

67.1 Because the Act empowers the Commission to grant provisional authorisation “for the purpose of enabling due consideration to be given to the application or for any other reason”, we consider there must be some minimum basis to grant provisional authorisation while the application for full authorisation is being duly considered. However, the satisfaction of this minimum element will usually be treated as neutral in the overall assessment, to avoid the ‘double counting’ of a benefit.

67.2 Nonetheless, the need to avoid an imminent and substantial detriment in the period that the Commission requires to give due consideration to the full authorisation application is a factor that could weigh in favour of provisional authorisation being granted. This is particularly the case where the detriment would affect the wider industry, public, or consumers as well as the applicant.

67.3 Similarly, the potential to realise a substantial benefit, particularly to the wider public, that could be unavailable if the applicant could not engage in the conduct until the Commission has given due consideration to the full authorisation application, could also weigh in favour of provisional authorisation being granted.

33. The Commission is satisfied that the urgency factor is satisfied in this case given our conclusions above in relation to benefits that are likely to arise from provisional authorisation and potential harm to the TGA and others if authorisation is not granted.

Balancing of factors

34. Based on the information available to the Commission at this time, and for the reasons explained above, we consider it is appropriate to grant the Second Provisional Authorisation.

Duration

35. Given the advanced stage of the Commission’s investigation we consider it appropriate that provisional authorisation is granted through to the date determined by the operation of s 65AD(5), being until the Full Authorisation is determined, withdrawn or revoked.

Dated this 1st day of April 2022:

Sue Begg

Deputy Chair

Appendix A: Proposed Arrangement

Proposed Arrangement

1. TGA seeks for itself, the Regional Associations, and the Growers, together with future Growers, provisional authorisation to:
 - 1.1 collectively discuss and negotiate with Tegel:
 - 1.1.1 growing fees and other terms and conditions of chicken growing contracts;
 - 1.1.2 adjustment and review of growing fees and other matters arising from time to time under/or in relation to terms of chicken growing contracts; and
 - 1.1.3 resolution of disputes which from time to time arise under chicken growing contracts or otherwise arise between Tegel and a grower or growers;
 - 1.2 discuss amongst themselves matters relating to growers' discussions and negotiations with Tegel (whether collective or otherwise) on the matters referred to above;
 - 1.3 without limiting paragraph 1.2 above, exchange information between themselves concerning growers' discussions and negotiations with Tegel (whether collective or otherwise) on the matters referred to at paragraph 1.1 above, including offers or proposed offers made or to be made to Tegel by or on behalf of a grower or growers, offers made by Tegel to a grower or growers, and acceptances or proposed acceptances by any party of any such offers;
 - 1.4 enter into agreements collectively negotiated between Tegel and TGA (or a Regional Association) and/or negotiated between Tegel and the Growers containing common terms, relating to the matters described at paragraph 1.1 above; and
 - 1.5 give effect to agreements collectively negotiated between Tegel and TGA (or a Regional Association) and/or negotiated between Tegel and the Growers containing common terms, relating to the matters described at paragraph 1.1 above, including provisions:
 - 1.5.1 setting growing fees;
 - 1.5.2 providing for the adjustment or review of growing fees; and
 - 1.5.3 providing for payments to be made by Tegel to growers, or by growers to Tegel in connection with the resolution of disputes between Tegel and a grower or growers.

2. Together, the Commission refers to the above behaviour as the Proposed Arrangement.
3. TGA states that chicken growers may choose not to participate in collective negotiations and will be free to negotiate with Tegel individually, and as such have not previously engaged in a collective boycott.
4. The Commission is not authorising any persons to engage in a collective boycott. Collective boycott includes but is not limited to any collective refusal to supply (or acquire) goods or services from any person. In our view, collective boycott activity could occur even if some parties are free to opt out of any collective boycott.